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In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 1169

ALFRED S. CALABRESE and JOHN M. DELZOPPO,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

JAMES R. WILLIS,
202 Cleveland Transit Building,
1404 East Ninth Street,
Cleveland, Ohio 44114,
Counsel for Petitioners.

Of Counsel:
PHILLIP A. BARRAGATE,
BARRAGATE AND BARRAGATE,
1333 Illuminating Building,
Cleveland, Ohio 44113.

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Petitioners, by and through their counsel, respectfully move this Court for an order granting a Writ of Certiorari directed to the United States Court of Appeals for the Sixth Circuit.

OPINION OF THE COURT BELOW.

The opinion of the United States Court of Appeals for the Sixth Circuit is appended to this petition and is contained in the Appendix at page 18.

JURISDICTION.

The jurisdiction of this Court is invoked pursuant to Title 28, Section 1254(1) of the United States Code:

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

The judgment sought to be reviewed herein was decided on the 15th day of January, 1970, and entered on said date by the Clerk of the United States Court of Appeals for the Sixth Circuit.

Petitioners have made no request for a rehearing and no request for an extension within which to petition for certiorari.

QUESTIONS PRESENTED FOR REVIEW.

I. Did the Trial Court's participation in the trial by its actions, questioning and comment cause a denial to the defendants of their right to the assistance of *effective* counsel for their defense?

II. Did the Trial Court's error in impeding of defense counsel's questioning of government witnesses in regard to Jencks Act statements preclude the defendants from a full and complete cross-examination and thereby deny to the defendants their right to confront the witnesses against them?

CONSTITUTIONAL PROVISIONS INVOLVED.

I. Amendment IV—Constitution of the United States.

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty or property, without due process of law*; nor shall private property be taken for public use, without just compensation."

II. Amendment VI—Constitution of the United States.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him;* to have compulsory process for obtaining witnesses in his favor, *and to have the assistance of counsel for his defense.*"

STATEMENT OF THE CASE.

Proceedings Below.

The defendants were indicted by the Grand Jury for the Northern District of Ohio, Eastern Division, for violation of Title 18, Section 2113 (a) and (d) United States Code.

In substance, the indictment of the Grand Jury was that the defendants on the 14th day of December, 1967, engaged in the robbery of the Society National Bank, Euclid-Green Branch, Cleveland, Ohio, and took from said bank the sum of approximately $27,719.99.

On February 9, 1968, defendants were arraigned before the Honorable Thomas D. Lambros of the United States District Court of the Northern District of Ohio, Eastern Division, and to said indictments, the defendants both entered their plea of not guilty.

On April 26, 1968, the Jury Trial of the defendants was commenced in the Court Room of the Honorable Thomas D. Lambros. On May 16, 1968, the jury after deliberating over a period of three (3) days were unable to reach a unanimous verdict as to the defendants' innocence or guilt, and the jury was thereupon dismissed by the court.

The second trial of said cause was commenced on October 1, 1968, before the Honorable Frank J. Battisti of the United States District Court of the Northern District of Ohio, Eastern Division.

On the 14th day of October, 1968, the jury, by unanimous verdict, found the defendants guilty upon the indictment as charged, and on the 18th day of December, 1968, the defendants were sentenced by said court to imprisonment for a period of 18 years pursuant to the provisions of Title 18, Section 4208 (a) (2) United States Code. At said time, said Court further ordered that bond on appeal be set in amount of $50,000 for each defendant.

Within the time prescribed by the rules of the United States Court of Appeals for the Sixth Circuit, an appeal to said Court was filed by said defendants.

Oral argument upon said appeal was duly had before said Court, on the 30th day of September, 1969, and judgment affirming the decision of the District Court was made and entered on the 15th day of January, 1970, together with the opinion attached hereto.

Relevant Facts.

During the trial of said cause from which this appeal is taken, the government, in its case in chief presented a total of 12 witnesses; the defense presented 7 witnesses; and the government presented one witness in rebuttal.

The first six witnesses called by the government were bank employees on the date in question and each testified to what they observed as to the actions, clothing and descriptions of the three men who robbed the bank. None of the witnesses called by the government identified either of the defendants as being any of the men who they observed robbing the bank on said day.

The next six witnesses called by the government were

city police officers and agents of the Federal Bureau of Investigation who had taken part in the investigation of the case. One of said agents of the Federal Bureau of Investigation was agent Nelson K. Jennett who testified that *human head hairs* taken from nylon stockings found along what the government contended to be the escape route, did not match samples of head hairs furnished to him as having come from the defendants.

Upon the conclusion of the government's presentation of its case in chief, defendants began the presentation of their case.

In support of the defense contentions, the defense called seven witnesses:

1. Special Agent Emil F. Hracek of the Federal Bureau of Investigation who testified as to the content of his interviews with bank employees during the course of his investigation of the day in question.

2. Detective Richard Reiss, Cleveland Police Department, who testified that the Cleveland Police Department received the first alarm, indicating the bank robbery was in progress at 10:40 a.m., and that at 10:47 a.m. a call was received from Car 653 indicating that that car was going to assist the East Cleveland police who had two males in custody in connection with the bank robbery.

3. Rollie J. Oker, former Cleveland Police Lieutenant, who testified to the results of certain tests conducted by him at the request of the defense, including a test to determine the amount of time it would take to travel from the bank in question to the point where the defendants were arrested.

4. Bernard W. Siegel, a taxicab driver and resident of the apartment house where the escape vehicle

was discovered, who testified that the escape vehicle as depicted in government's photographs was not in that location when he arrived at his apartment house at approximately 11:18 a.m. on the day in question.

5. Charles J. DiNardo, M.D., who testified as to his medical treatment of the defendant, Alfred S. Calabrese during November and December, 1967.

6. Mrs. Patricia Calabrese, wife of the defendant, Alfred S. Calabrese who testified as to the clothing worn by the defendant when he left his home on the morning of the day in question.

7. Mrs. Ann Calabrese, the mother of the defendant, Alfred S. Calabrese whose testimony was not permitted by the Trial Court.

Upon conclusion of all the testimony and rebuttal, the case was submitted to the jury which thereafter returned its verdict of guilty.

ARGUMENT.

I.

It is respectfully submitted that the jurisdiction of this Court is invoked and review by Writ of Certiorari is requested for the reason that a Court of Appeals (Sixth Circuit) has sanctioned a far departure by a lower Court from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

In support of counsel's contention that the jurisdiction of this Court is properly invoked, it is respectfully submitted that the comments, actions and questioning by the Trial Court were such as to deny the Petitioners their right to the assistance of *effective* counsel.

During the cross-examination of the initial witnesses

on behalf of government, counsel for the petitioners was interrupted by the Court spontaneously and without objection by the government on many occasions, which not only had the effect of destroying the continuity of the cross-examination but likewise had the effect of casting aspersions upon counsel and thereby upon the Petitioners. This counsel's ability to *effectively* assist the Petitioners was, thereby, greatly diminished. Rather than direct his abilities toward the assistance of Petitioners in their defense, counsel was forced to expend most of his efforts in attempting to counter the harm of the trial Court's actions as to its effect upon the jury.

When the Trial Court did not use spontaneous interruptions to destroy the effectiveness of counsel's cross examination, the Court did so by appropriately placed explanation to the jury as to the government's conduct which was the subject of the particular cross-examination.

By way of example, during the cross-examination of the government's witness, Betty Jamison, the defense established that prior to testifying, the witness had viewed a motion picture film of the bank robbery in progress. The defense went on in its questioning, in the hope of demonstrating that some of the witnesses' testimony as to clothing and physical description resulted not entirely from the recollection of that day but from the viewing of the motion picture film before testifying.

At the conclusion of the defense cross-examination in this regard, the government conducted a re-direct examination of the witness with the proper intention of repairing any damage that had been done to the witnesses' testimony by the defense cross-examination. Before, however, the government's attorney could even begin to attempt to rehabilitate the witness, the Court interrupted the questioning and commented to the jury as follows:

> "The Court: So the jury understands with regard to this question by Mr. Barragate as to her recollection, and questions by Mr. Oakar as to the witness' recollection, it is perfectly proper—and I am sure that all of us, having due regard for our human nature, will understand the reasonableness of such a rule of law—for witness to use, under certain circumstances, certain visual aids or records or writings, etc. to refresh one's recollection. And that is really what we are talking about." (R. 145-146.)

Indeed the Court was so effective in its rehabilitation of the witness that the government's attorney realized there was no need to proceed further in this area and went on to another point.

It must be noted that this counsel is not complaining that what the Court said was erroneous. However, counsel complains that the Court's consistent interjection of comments at a precise time when the effects of the comments were to destroy any ground established by defense in cross-examination was erroneous. Likewise, the comments created an impression with the jury that the defense counsel was trying to deceive them into thinking the government had acted improperly when in fact the only purpose of defense counsel was to attack the witness' identification of certain clothing and that purpose was certainly proper.

In further illustration, during the cross-examination of government's witness, Helen Kousakes, defense counsel attempted to demonstrate that certain items of clothing identified by the witness on the witness stand, had in fact been seen by her in the government attorney's office prior to her testimony, and that, therefore, her identification of those items could have come from that viewing rather than from what she observed at the time of the robbery. Again, however, the Court saw fit to inject himself into the trial and made the following comments:

> "The Court: Members of the jury, in order to help you understand with regard to the last bit of examination, it is a rare experience indeed for counsel on either side to put a witness on the stand whom they have not spoken to previously, and it would probably be a complete dereliction of duty in most instances for counsel to place a witness on the witness stand whom they have not at least attempted to interview before putting them on the stand, so as to have some idea as to what that witness is going to say or whether or not they really have anything to add to the case.
>
> So, under no circumstances should you assume, from the mere fact that counsel has interviewed a witness previously in his attempt to determine what the witness would say before testifying in Court, that this is somehow wrongful conduct, bad conduct, etc. Far from that, it is only proper conduct." (R. 169-170.)

Clearly, the effectiveness of Petitioners' counsel was again destroyed by the *Court's* rehabilitation of the witness and the Court's stamp of approval on the government's conduct.

One of the most harmful facets of the denial of the *effective* assistance of counsel took place during the cross-examination of one of the government's major witnesses, namely, Special Agent Nelson K. Jennett of the Federal Bureau of Investigation.

The Court's interruption came as counsel was attempting to establish a *most vital* point in the cross-examination of Agent Jennett, to-wit: that human head hairs supplied to him as having come from the Petitioners were dissimilar from the head hairs supplied to him by the Cleveland office of the Federal Bureau of Investigation found in stocking masks near the scene of the crime and contended by the government to have been worn by the bank robbers in question.

The Court's interruption took the form of cross-examination of the witness which was clearly directed at establishing the government's contention, to-wit: that Agent Jennett did not know positively that the head hairs supplied by the Federal Bureau of Investigation, in fact, came from the Petitioners (R. 437-440).

It is respectfully submitted that it is not the purpose of this Petition for Writ of Certiorari to set out in detail the errors complained of, and that such would not be proper in view of the rules of this Court which call for a concise argument as to the reasons relied on for the allowance of the Writ.

Suffice it to say, that the record will clearly demonstrate in regard to the present discussion that:

(1) All questions asked by the Court consistently were such as to aid only the government;

(2) The questions asked by the Court would have undoubtedly been asked by the government and, as such, would have had their proper weight with the Jury.

(3) That in its questioning, the Court often indicated, whether intentionally or otherwise, its opinion on the evidence or on the credibility of the witness and that opinion on the evidence or credibility consistently favored the government;

(4) That the Court's questioning and comments often came during the heart of the defense cross-examination and thereby greatly diminish the effectiveness of the defense counsel.

(5) That the Court's questioning and comments took not the form of clarification but the form of advocacy and thereby destroy the aura of fairness and impartiality.

(6) That the Jury was thereby substantially affected and prejudicial error resulted.

It is to be noted that in its opinion, the Court of Appeals, for the Sixth Circuit, states that the record discloses that on a number of occasions, the District Judge interrupted attorneys for both parties in the course of direct examination or cross-examination and interrogated witnesses from the Bench. (Opinion of the Court of Appeals —page 9.) In reply thereto, however, it is respectfully submitted that a reading of the record will disclose that all such interruptions and interrogations of witnesses favored, *in each and every instance,* the government and had but one effect: to advocate the case of the government. It is respectfully submitted that under this situation, the effectiveness of the Petitioners' counsel was nil and such amounted to as much a denial of the assistance of counsel as if counsel were not allowed to be present in the Court Room.

It is further respectfully submitted that in the opinion of the Court of Appeals (Opinion of the Court of Appeals —page 10), said Court found that the interruptions, comments and questioning of witnesses by the trial court was "regrettable" but did not deprive defendants of a fair trial since the District Judge explicitly instructed the Jury that no inferences were to be drawn by his questions or comments. It is inconceivable to this counsel how questioning of witnesses, comments and interruptions from such an authoritative source as the District Judge in a District Court Trial Room can be adequately set aside in a Jury's mind by the mere instruction of the Judge that no inferences were to be drawn by his actions.

Lastly, it is respectfully submitted that had the record disclosed that the "regrettable" interruptions, comments and interrogation of witnesses was evenly distributed by

the Court, said actions of the Court would perhaps merely be regrettable rather than prejudicial. It is, however, respectfully submitted that a review of the record, if such is permitted by this Court, will clearly demonstrate that *in each and every instance,* the comments, actions and questioning by the Court had the effect of:

(1) Interrupting the examination by defense counsel and destroying the continuity thereof;
(2) Rehabilitating government witnesses;
(3) Impeaching defense witnesses;
(4) Advocating, illustrating and condoning a point in the government's case;
(5) Rendering defense counsel ineffective.

II.

The Petitioners respectfully submit to this Court that one of their most vital rights under the Constitution of the United States is their right to confront the witnesses against them and conduct a cross-examination of those witnesses if they so desire.

The Petitioners herein desired the opportunity to confront and cross-examine the witnesses against them. However, it is respectfully submitted that because of the Court's erroneous ruling on statements which were later admitted to be "Jencks Act" statements, the Petitioners were prevented in their right of a full and complete cross-examination and confrontation of witnesses.

Certain eye-witnesses to the bank robbery in question made statements to agents of the Federal Bureau of Investigation on the day of the occurrence. During the course of the first trial, which resulted in a jury unable to reach a unanimous verdict, the judge therein ordered production of said statements to the defense on the basis of the Jencks Act, 18 U.S.C. Section 3500. During said first

trial, the statements were in the possession of defense counsel and were used for purposes of cross-examination by defense counsel in *exactly* the same manner as they were attempted to be used in the second trial. At no time during the course of the first trial did the trial judge therein *or the government* have occasion to object to the manner of use of said statements. During the course of said first trial, defendants were afforded a full and complete right of cross-examination of said witnesses based upon said statements.

During the course of the second trial, however, and upon defense counsel attempting to use said statements in cross-examination and exactly in the manner in which they were used in the first trial, the Court interrupted said cross-examination and refused to allow counsel to examine "as though the statement was one given under the Jencks Act."

> "The Court: I am not saying that, Mr. Barragate, that you cannot—the information that is contained in those statements is available to you. All right? You may use that information as best you can with regard to the conduct of your case, but you cannot cross-examine a witness with that statement as though this was a statement she gave under the Jencks Act."

It was at this point that the Court made an admittedly erroneous determination that the statements of the various eyewitnesses were not Jencks Act statements, and that, therefore, the witnesses could not be cross-examined upon those statements as though they were. It is respectfully submitted that it is still unknown to this counsel how said statements could be used "as best counsel could with regard to the conduct of his case," but without cross-examining the witness as though the statement was one given under the Jencks Act. It must be further stated that

the government's attorney encouraged the Court in its error notwithstanding the fact that said attorney knew that the statements had been agreed to be Jencks Act statements by both defense and government attorneys and that the manner of cross-examination regarding these statements was exactly similar to that conducted during the course of the first trial.

This situation in regard to the inability of the Petitioners to effectively confront and cross-examine the witnesses against them continued during the course of the *entire examination* of the eye-witnesses herein. Upon the discovery of its error, which came only after the completion of *all of the testimony of the eye-witnesses*, and without the opportunity of a full and effective cross-examination and confrontation, the Court offered defense counsel an opportunity to recall these witnesses for further cross-examination pursuant to the Court's discovery that the statements were in fact Jencks Act statements.

> "The Court: However, it appears to the Court that defense counsel sincerely and conscientiously and in good faith believed that the Court, when it ordered the government to turn over the statements, that they were Jencks Act statements that could be used in the cross-examination of that witness as though that witness had adopted that statement as his own. I am convinced at this point that counsel for defense believed that, and in good faith believed it.
>
> The government really held back admitting whether these could be turned over as Jencks Act statements, and I think did so to some extent out of desperation, and admitted only after, for all practical purposes, most all of the cross-examination of the government's bank witnesses had been conducted that they were Jencks Act statements given by the witnesses to the F.B.I., or as a record of the F.B.I.'s interviews of the witnesses, and agreed to admit each of

these memorandums as joint exhibits." (R. 340-341.)

In reply to the Court's availing defense counsel of the opportunity to recall the witnesses for further cross-examination, defense counsel responded as follows:

> "Mr. Barragate: The opportunity to cross-examine the witnesses two or three days after the direct examination has been completed, and the impeding of counsel for the defense in the effective cross-examination of the witnesses immediately following the direct examination, can never correct the harm that is done. The harm has been done." (R. 308-309.)

Indeed, the *very nature* of the statements in that they contained inconsistencies with the testimony given in Court required the questioning upon them to be had immediately after the direct examination when the Jury would have an opportunity to have a fresh recall as to what the witness had testified to on direct. By recalling the witness for cross-examination at a later time and especially after an intervening weekend, defense counsel could not hope to draw the inconsistencies sharply in the Jury's mind.

It is further respectfully submitted that this counsel cannot agree with the opinion of the Court of Appeals wherein said Court indicates that "the District Court merely disapproved of a method that was being employed by defense counsel." (Court of Appeals Opinion, page 6.) The "method" which the Court refers to was the fact that defense counsel held the statement in his hand and asked the witness on the stand whether or not something in that statement was in fact said by the witness to an agent of the Federal Bureau of Investigation on the day of the bank robbery. What possibly could be wrong with this

method of cross-examination is still unknown to this counsel; yet, the District Court found this improper on the basis that "the agent was not yet put on the stand and the witness already having denied or having admitted of no knowledge with regard to this statement being read from could not be cross-examined with regard to it."

Lastly, it is respectfully submitted that it is admitted that the District Court initially made an erroneous ruling as to the statements in question; it is further respectfully submitted that on the basis of said erroneous ruling, the District Court impeded and destroyed the effectiveness of defense counsel's cross-examination of important witnesses and thereby denied the Petitioners their right to confront and cross-examine the witnesses against them; it is further respectfully submitted that the later offer of the District Court Judge to recall the various witnesses for further cross-examination in view of his new ruling was clearly, as viewed by one possessed of trial experience, not equal to the right to cross-examine the witnesses upon the conclusion of their direct examination or at a time when said direct examination would be firmly available for contrast in the minds of the jury.

In the last analysis, it must be stated that the error of the District Court being admitted, the real question is whether the offer of the District Court to recall the witnesses for cross-examination, long after their examination had been complete, sufficiently availed the petitioners of an opportunity to remove the prejudice that had resulted to them, and to fully exercise their constitutional rights to effective assistance of counsel and confrontation and cross-examination of witnesses. The Circuit Court of Appeals undoubtedly was of the opinion that said offer on the part of the District Judge was sufficient to avail the Petitioners of an opportunity to remove said prejudice

from themselves and to exercise their rights as indicated. Petitioners respectfully submit to this Court, however, that the burden should not have been placed *upon them* to remove the prejudicial effect created by an error of the Court and that even if the petitioners had availed themselves of the Court's offer, they would not only have had the burden of removing such prejudicial effect, but would have been unable to do so in view of the time difference that would have existed in the testimony. It is Petitioners' hope that the members of this Court, calling upon their wisdom, understanding and past experience in the Trial Court, will conclude, as do Petitioners, that Petitioners were denied effective assistance of counsel and were further denied the right to confront and cross-examine witnesses against them.

In conclusion, it is respectfully submitted that for the reasons above stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JAMES R. WILLIS,
Counsel for Petitioners.

Of Counsel:

PHILLIP A. BARRAGATE,
BARRAGATE AND BARRAGATE,
1333 Illuminating Building,
Cleveland, Ohio 44113.

APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 19,316.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALFRED S. CALABRESE and JOHN M. DELZOPPO,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Decided January 15, 1970.

Before PHILLIPS, Chief Judge, and EDWARDS and McCREE, Circuit Judges.

PHILLIPS, Chief Judge. Defendants appeal from their convictions under 18 U.S.C. § 2113(a) (d) for armed robbery of a branch office of the Society National Bank of Cleveland, Ohio.

Two issues are raised by defendants on this appeal: (1) Whether the District Court improperly restricted defense counsel in the use of alleged Jencks Act statements in the cross-examination of government witnesses to the extent of depriving defendants of a fair trial; and (2) whether defendants were deprived of a fair trial by comments from the bench, interruptions by the District Judge and by his examination of witnesses during the course of the trial. Although not directly raised by defendants, this Court further has considered the threshold question of

whether there is sufficient evidence in the record to sustain the jury's verdict of guilty.

In order to pass upon this issue, the entire transcript of the trial has been read and the exhibits have been examined.

1) Sufficiency of the Evidence

A jury verdict must be sustained if, taking the view of the evidence most favorable to the government, there is sufficient evidence to support it. *Glasser v. United States*, 315 U.S. 60, 81; *United States v. Shipp*, 359 F.2d 81, 90 (6th Cir.).

At the outset we note that the first trial of this case ended with the jury unable to agree as to the guilt or innocence of the defendants. Hence we have scrutinized the evidence in the present case with an extra degree of care.

On the trial, which extended over a period of almost two weeks, the government introduced twelve witnesses in its case in chief and one witness in rebuttal. The defense presented seven witnesses. Defense counsel stipulated that a robbery had occurred and that some $27,000 was taken.

Mr. Williams, the bank custodian, testifying as a government witness, stated that on the day in question three men entered the Euclid-Green branch bank wearing stocking masks over their heads and faces. The first one to enter, Williams related, proceeded to the counter and vaulted over it. The second man stood near the counter, while the third kept bank personnel and customers under guard. He further testified that the first robber wore a long sleeved plaid flannel shirt, blue trousers and black shoes. He identified the shirt by saying, "I would swear this is the shirt that the fellow had on that came in here."

The shirt was government exhibit 17. He also gave a general description of the two other men and identified several items, including shoes, hats and trousers, as being the type worn by the robbers. He also identified photographs of the robbery in progress taken by cameras activated by the alarm switch. He made an identification of one of the defendants as having a prominent nose like the one he observed protruding underneath the stocking mask worn by the robber who jumped over the counter.

The third government witness, a bank secretary, Mrs. Jamison, gave testimony which generally corroborated Mr. Williams. She agreed that the first robber wore dark trousers, but remembered them as being green. Further she recalled that this robber had a sharp profile with a protruding nose.

Three other bank employee witnesses provided generally corroborative testimony. The first government witness had testified that shortly after the robbery was under way one of the bank employees activated the alarm system which set in motion a signaling process which included a signal to the police department. She testified that the robbery was in progress for about one minute between approximately 10:30 or 10:35 a.m.

Officer Lloyd provided a major link in the chain of evidence connecting these defendants with the robbery. Lloyd testified that he was a police officer employed by the City of East Cleveland and was on duty the morning of the robbery. He related that about 10:30 a.m. he received over his police radio a broadcast to the effect that a robbery had occurred at the Euclid-Green branch bank, located on Euclid Avenue. According to his testimony the broadcast was a "standby call" and he proceeded slowly up Euclid Avenue in the direction of the bank, driving an unmarked detective cruiser. At that point he heard a

second broadcast which told the direction the robbers were believed to be traveling and he turned in that direction onto Belvoir Boulevard. This was away from the general direction of the bank. Officer Lloyd testified that he was wearing civilian clothes and was not wearing a hat. As the officer proceeded along Belvoir at about twenty miles per hour in light traffic he said he noticed another car approaching him and that as it passed he recognized one of the occupants as the defendant John Delzoppo. As the car proceeded away from him he watched it in his rear view mirror and observed a "bundle" thrown from the passenger side of the automobile. He immediately turned around and drove back to the spot where the "bundle" had fallen and observed that it was clothing. He continued in pursuit of the automobile, overtook it in a short distance and stopped it, arresting the driver, Alfred Calabrese, and the passenger, John Delzoppo, on suspicion of robbery. Other officers arrived at the scene to assist. Officer Lloyd then returned to pick up the "bundle," and according to his testimony, the "bundle" consisted of a pair of trousers and a shirt. The shirt was identified by the officer as government exhibit 17.

Other testimony by government witnesses was inconclusive but was not inconsistent with the evidence implicating the defendants. Agent Jennett of the FBI testified that hair found in certain stockings discovered near the scene of the bank did not match samples of hair furnished to him as having come from the defendants.

The defendants did not take the stand in their own behalf. Through other witnesses they introduced testimony which tended to contradict government testimony: that certain of the items of clothes in evidence were too large to have been worn by either of the defendants; that the defendants were arrested at a place they could not

have reached in the time that had elapsed after the robbery; that neither defendant was ever connected with the getaway car; that the loot was never recovered; and that no weapons or other contraband were shown to have been connected with the defendants.

The government rebuttal witness testified that on the basis of tests that he conducted, defendants would have had time to have disposed of the loot, changed clothes and driven to the point where they were arrested after the robbery.

Some of the evidence introduced by defendants tended to exculpate them. Part of the defense evidence was not necessarily inconsistent with the charges. We conclude that the defense evidence would not have prevented a finding of guilty beyond a reasonable doubt, determination of credibility being the province of the jury.

We cannot say, on this record, that there is not sufficient evidence to support the verdict.

2) The Jencks Act Question

Defendants claim that certain statements made by government witnesses to FBI agents regarding the events of the robbery are within the Jencks Act, 18 U.S.C. § 3500. The trial court ultimately concluded, pursuant to a government admission, that the statements were within the scope of the Jencks Act. We assume for purposes of this opinion that these are Jencks Act statements. Defendants further claim that the trial court unduly restricted the cross-examination of the government witnesses through use of these statements.

We have found no case delineating with precision the permissible way to cross examine witnesses through the use of Jencks Act statements. It was said by the Supreme Court that: "The statute governs the production of docu-

ments; it does not purport to affect or modify the rules of evidence regarding admissibility and use of statements once produced." *Palermo v. United States*, 360 U.S. 343, 354. One of the main purposes of the Act is to permit defense counsel to use the statements for impeachment purposes. *Palermo v. United States, supra*; *United States v. Wenzel*, 311 F.2d 164, 171 (4th Cir.). The statute does not attempt, however, to set out rules governing the conduct of trials. We see no reason to conclude that Congress by this statute intended to restrict the trial judge's management of the courtroom, or to invade the functions of the District Judge with respect to the examination of witnesses and the manner of impeachment. It obviously would have been futile for Congress to have undertaken to anticipate the many courtroom situations in which this problem could arise. Therefore, the Supreme Court's observation as to another question under the act is applicable here. "Final decision * * * must rest, as it does so very often in procedural and evidentiary matters, within the good sense and experience of the district judge * * *." *Palermo v. United States, supra*, 360 U.S. 343, 353. Rigid rules cannot provide a practical solution to the problem at hand. On an examination of the record we determine whether all cross-examination was forbidden, and, if not, whether the opportunity which remained permitted or would have permitted the full development of evidence and an adequate exposure of inconsistencies. Where there was otherwise no abuse of discretion or prejudice, if a fair opportunity to cross-examine and impeach remained, the District Court's determination must stand. See *Glasser v. United States*, 315 U.S. 60, 83; *Alford v. United States*, 282 U.S. 687; *Howard v. United States*, 389 F.2d 287, 292 (D.C. Cir.); *Foster v. United States*, 282 F.2d 222, 224 (10th Cir.) *Robles v. United States*, 279 F.2d 401, 405 (9th Cir.), cert. denied, 365 U.S. 836.

The record shows that the statements in question were furnished by the government to defense counsel well in advance of the examination of the witnesses sought to be cross-examined. The record further discloses that, even before the District Court ruled that the statements were within the scope of the Jencks Act, cross-examination and impeachment were not prevented. The District Court merely disapproved of the method that was being employed by defense counsel. The following colloquy took place between the Court and defense counsel:

> "Mr. Philip C. Barragate: No, your Honor; I assumed that they were given to us in accordance with the law under the Jenks [sic] Act. And if they were not given to us for that purpose, I would like to have the Court's ruling on that question, because I want to clearly understand this Court. * * * If the Court is going to tell me that I cannot use these statements in cross examination, I assure your Honor that I will take my exceptions for the record but I will not use those statements under any circumstances.
>
> "The Court: I am not saying that, Mr. Barragate, that you cannot—the information that is contained in those statements is available to you. All right? You may use that information as best you can with regard to the conduct of your case, but you cannot cross examine a witness with that statement as though this was a statement she gave under the Jenks [sic] Act.
>
> "Now, the Court sees nothing wrong or improper, if there are variances between what you read in that statement and what the witness is saying from the stand, the Court sees nothing improper with your asking the witness, 'Did you state to Agent So-and-so of the FBI that the first bank robber wore gray trousers?' There is nothing wrong with that, but I do see something wrong with your holding it up and reading it as though that were her statement, because until you put the agent on, this witness already having

denied or having admitted of no knowledge with regard to the statement you are reading from, she certainly cannot be cross examined with regard to it.

"Mr. Phillip C. Barragate: For the sake of clarity, so I understand the Court and so that I do not offend the Court, may I ask a witness who has made a statement, first, whether or not she talked to the agent and, secondly—

"The Court: Oh, sure.

"Mr. Phillip C. Barragate: —if she talked to the agent, in the course of the conversation did she say thus and so to the agent? That is all I have been doing all the time, that is all I am trying to do, so that if she denies it or doesn't recall it, we call in the agent and say, 'Did you investigate this matter? Did you talk to this witness? Did this witness say thus and so to you or not?'

"That is all I am trying to get, and I don't want to use it for any other purpose except that. Now, if it is all right with the Court that we do that, that is what I will do. And if the Court doesn't want us to do that, let me assure your Honor that I am not going to do it."

The initial ruling of the District Court came at a point on the third day of the trial when the bank employee witnesses were testifying. This was on Thursday, October 3. The next session was held on the following Monday. Before the first witness was called on this day it was stated that the government had admitted that the statements in controversy were within the Jencks Act. The Court made an offer to defense counsel to recall any of the witnesses for further cross-examination in light of the court's ruling that, pursuant to the government's admission, the statements would be regarded as Jencks Act statements. Furthermore, the statements themselves were introduced into evidence as joint exhibits. At this time it appeared that

defense counsel would recall some witnesses. Counsel informed the Court as follows:

> "Mr. Phillip C. Barragate: Your Honor, before we get to that particular stipulation, I want to say to your Honor that, with respect to recalling certain witnesses now that we do have the statements in evidence, we will let your Honor know some time before the day is out which of the witnesses we would like to recall."

On Tuesday counsel stated that he did not desire to take the opportunity to recall because he felt that further cross-examination would not remove the prejudice already created. He moved for a mistrial. Although denying the motion, the Court prepared and gave a comprehensive instruction to the jury as to the matters defense counsel has raised concerning the confusion about the statements.

Although the District Court initially limited to some extent the use of the statements on cross-examination, we hold on a review of the entire record that the limitation was not so severe as to constitute an abuse of discretion. This is not a case where cross-examination was forbidden or terminated. The type of questions to be asked and the manner of asking them is the gravamen of the controversy. These matters are those peculiarly within the trial court's sound discretion and his broad province to control courtroom conduct. *Foster v. United States, supra; Robles v. United States, supra; Roseman v. United States,* 364 F.2d 18, 27 (9th Cir.), cert. denied, 386 U.S. 918. See also, *Darby v. United States,* 283 F.2d 896 (10th Cir.).

It has not been shown that any substantial right of defendants were prejudiced. Even if some prejudice might have occurred at the time of the initial ruling by the District Court, we think the subsequent opportunity presented by the District Judge to recall and cross-examine

the witnesses after the ruling as to the Jencks Act character of the statements, in conjunction with the Court's instruction to the jury, was all that was necessary under the facts of this case.

3) Comments, Interruptions and Questioning of Witnesses by District Judge

The record discloses that on a number of occasions the District Judge interrupted attorneys for both parties in the course of direct examination or cross-examination and interrogated witnesses from the bench. This Court previously has expressed the view that this "is not to be commended as a desirable practice." *United States v. Lewis,* 338 F.2d 137, 141 (6th Cir.), cert. denied, 380 U.S. 978. In *United States v. Carabbia,* 381 F.2d 133, 139 (6th Cir.), cert. denied, 389 U.S. 1007, this Court, speaking through Judge Cecil, said: "We do not look with favor on extensive examination of witnesses by the trial judge in a jury trial." We do not find, however, that the interruptions and questioning by the District Judge, or his comments from the bench in the present case, "take him outside the limits of permissibility as outlined in *Quercia v. United States,* 289 U.S. 466." *United States v. Vida,* 370 F.2d 759, 768 (6th Cir.), cert. denied, 387 U.S. 910. The District Judge explicitly instructed the jury that no inferences were to be drawn by his questions or comments.

We conclude that the interruptions, comments and questioning of witnesses, although regrettable, did not deprive defendants of a fair trial, viewing the record in its entirety.

Affirmed.

JUDGMENT OF THE COURT OF APPEALS.

(Filed January 15, 1970.)

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 39(b).

Entered by order of the Court.

CARL W. REUSS,
Clerk.

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No. 1169

In the Supreme Court of the United States

OCTOBER TERM, 1969

ALFRED S. CALABRESE AND JOHN M. DELZOPPO,
PETITIONERS,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
WILL WILSON,
Assistant Attorney General,
JEROME M. FEIT,
MERVYN HAMBURG,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 18–27) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 1970. The petition for a writ of certiorari was filed on February 11, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial judge's participation deprived petitioners of a fair trial.

2. Whether the court erred in initially placing a restriction (thereafter withdrawn) on the manner in which defense counsel could use certain FBI memoranda to impeach witnesses.

STATEMENT

On retrial,[1] petitioners were convicted of armed robbery of a federally insured bank, in violation of 18 U.S.C. 2113(a) and (d). On December 18, 1968, each was sentenced to imprisonment for eighteen years. The court of appeals affirmed (Pet. App.).

The evidence showed that shortly after 10:30 a.m. on December 14, 1967, three armed men robbed the Euclid-Green branch of the Society National Bank, Cleveland, Ohio. Each wore gloves, stocking masks and dark glasses. One wore a plaid flannel shirt and a hat, while the other two wore hooded sweatshirts. As one robber vaulted over the teller's counter and removed three trays containing more than $27,000, a second stood by or near the counter, and a third, carrying a carbine, kept watch over the customers (Tr. 48–49, 108, 172–176). The robbers exited from the bank less than one minute after they had entered (Tr. 378). They were seen driving away in a green 1964 Ford, heading west on Euclid and turning south on Cliffview Road, a few blocks away (Tr. 58). Within

[1] Petitioners' first trial before a different district judge ended on May 16, 1968, in a mistrial because the jury was unable to reach a verdict. The second trial began on October 1, 1968.

seconds of the robbers' entrance, one of the tellers had pressed an alarm button which triggered a movie camera and alerted police.

The police arrived momentarily, and obtained descriptions of the robbers and the getaway car, which were broadcast over the police radio. The report was heard by Officer William Lloyd, who was in an unmarked car driving on Belvoir Road near Cliffview. He immediately proceeded toward Cliffview Road. En route, he observed a 1966 Oldsmobile headed in the opposite direction. As the cars passed each other, the officer saw petitioner Delzoppo, whom he knew, seated on the passenger side of the Oldsmobile. Watching the Oldsmobile in his rear-view mirror, Lloyd observed a bundle of what appeared to be clothing being thrown out of the passenger side of that car. He stopped the Oldsmobile and arrested both Delzoppo and petitioner Calabrese, who had been driving (Tr. 230–238). Lloyd recovered the bundle, which contained a pair of blue work trousers and a plain flannel shirt, with at least one button missing (Gov't. Exh. 16, 17). Shortly thereafter, FBI agents searched along Belvoir Boulevard, and found two stockings, one of which had been knotted, and a pair of black gloves (Tr. 357–358, 364). The getaway car was located in an apartment house parking lot adjoining Cliffview and Belvoir Roads. In it were the empty bank money trays, a money wrapper, coins, and a shirt button (Tr. 292–295). A search of the Oldsmobile uncovered several items of clothing, including a pair of gloves, and four pairs of sunglasses

(Tr. 300–301). Later that day, Delzoppo told an FBI agent that he and Calabrese were driving to a stereo store when stopped, and that all he had thrown out of the window of the car were some tissues (Tr. 304).

At trial, the bank employees who had witnessed the robbery identified the plaid shirt recovered by Officer Lloyd as resembling one worn by one of the robbers. They also made similar identifications of other articles of clothing which had been removed from the defendants after arrest, including their shoes. Petitioner Calabrese fit the physical description of the robber who had vaulted over the teller's counter, and Delzoppo resembled physically the felon who had covered the bank customers (Tr. 50–56, 61–62, 67, 110–118, 155–160, 173–178).

ARGUMENT

1. The court below concluded that the trial judge's participation in the trial, although "regrettable", did not deny petitioners a fair trial (See Pet. App. 27). We submit that the record bears out the conclusion that the actual role undertaken by the judge did not go beyond permissible limits. Some of the court's interruptions reflected a desire to move the trial along and avoid time-consuming questioning of witnesses by either the prosecution or the defense, seeking to stress points already brought out by other testimony (*e.g.*, Tr. 119–121, 261–263). Other comments were within the court's responsibility to rule on evidentiary matters and control the orderly conduct of the trial (*e.g.*, Tr. 64–65, 72–73, 99–100, 136–141, 148, 196–197, 267,

455). The court's own questioning of a few of the witnesses was intended to clarify confusing matters. In one significant instance the examination resulted in an order favorable to the petitioners, that the opinion of an expert was to be disregarded (Tr. 467–484). The court's instructions to the jury during the course of trial dealt largely with the meaning of testimony which had just been elicited. Although such comments might have reduced the strategic value of that testimony, they were not, as petitioners themselves recognize (Pet. 8), erroneous in substance. Nor did they serve any purpose other than to clarify for a jury unschooled in legal procedures or evidentiary rules the legal significance of certain matters, such as testimony given at a previous trial (Tr. 67–69), statements by counsel uncorroborated by testimony of a witness (Tr. 83–84), testimony that defendant resembled the physical description of a robber (Tr. 100), and visual aids to refresh the recollection of a witness (Tr. 145–146).

At no time did the court express an opinion as to the guilt or innocence of petitioners. To the contrary, he admonished the jury that his exchanges with counsel were not to be regarded as favoring either side, and that there were no "hidden meanings in any of the court's language" (Tr. 150, 352).

The record as a whole thus demonstrates that the role performed by the trial judge, while an active one, did not take him beyond the limits of impartiality or serve to deny petitioners effective assistance of coun-

sel or otherwise impair their right to a fair trial. See *United States* v. *Carabbia,* 381 F. 2d 133 (C.A. 6), certiorari denied, 389 U.S. 1007.

2. Shortly after the robbery had been committed, an F.B.I. agent interviewed some of the bank employees, took notes, and thereafter prepared memoranda based upon his notes. Prior to petitioners' first trial, the court ordered the government over its objection to produce these memoranda, which had never been read, acknowledged or signed by the employees. The court felt that the memoranda did not qualify as statements producible under the Jencks Act, 18 U.S.C. 3500, but felt that the defense was entitled to use the statements to assist in preparing for trial.

During the first trial the presiding judge had allowed defense counsel to make full use of these statements in cross-examination. The government made no objection to counsel's reading from the statements in cross-examination. At the second trial the judge initially ruled that counsel could not "cross-examine a witness with that statement as though this was a statement she gave under the Jencks Act" (Tr. 210, Pet. App. 24), because the statements had been prepared by agents from the agents' notes and never seen by the employees. Cf. *Campbell* v. *United States,* 373 U.S. 487. If, however, defense counsel found variances between what the witnesses testified to and what defense counsel found in the statement, the court saw nothing wrong in counsel inquiring as to whether the witnesses had given contrary information to the F.B.I.

(Pet App. 24).[2] Counsel was allowed to proceed in that fashion.

After the testimony of the bank employees had been completed, the court learned that government counsel had no objection to the use of the memoranda as though they were Section 3500 statements, and that counsel was of the opinion that the statements might very well be producible under that statute. The government also agreed to admit the memoranda in evidence as joint exhibits (Tr. 341). The court then reconsidered its ruling on the manner of cross-examination. While it determined that petitioners had suffered no prejudice from the prior restriction on the use of the memoranda in cross-examination, the court nevertheless agreed to allow defense counsel to recall any of the bank employees who had given testimony and conduct further cross-examination. Defense counsel declined the offer, alleging that incurable prejudicial error had been committed (Tr. 333). The court thereafter instructed the jury on this matter, explaining the definition and use of a "Jencks Act" statement, and indicating that its prior ruling limiting the use of certain statements was not intended to show any favoritism (Tr. 343–355).

Even if these documents were properly usable under 18 U.S.C. 3500 to impeach the testimony of the bank tellers, no unreasonable restriction was placed on their

---

[2] As the district court stated "[t]here is nothing wrong with that, but I do see something wrong with your holding it up and reading it as though that were her statement * * *" (Pet. App. 24–25).

use by the trial judge, who has considerable discretion to see that cross-examination is conducted in a reasonable manner. See *Palermo* v. *United States*, 360 U.S. 343, 353; *Campbell* v. *United States*, 373 U.S. 487, 493. Moreover, when the court removed all restrictions and accorded defense counsel the opportunity to recall the witnesses, the defense chose to forego that opportunity. As the court of appeals ruled, the totality of these circumstances showed that petitioners suffered no prejudice (Pet. App. 26–27).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
JEROME M. FEIT,
MERVYN HAMBURG,
Attorneys.

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OCTOBER TERM, 1969.

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ALFRED S. CALABRESE and JOHN M. DELZOPPO,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY BRIEF OF PETITIONERS.

JAMES R. WILLIS,
202 Cleveland Transit Building,
1404 East Ninth Street,
Cleveland, Ohio 44114,
Counsel for Petitioners.

Of Counsel:
PHILLIP A. BARRAGATE,
BARRAGATE AND BARRAGATE,
1333 Illuminating Building,
Cleveland, Ohio 44113.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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REPLY BRIEF OF PETITIONERS.

REPLY TO GOVERNMENT'S STATEMENT OF FACTS.

In reviewing the statement of facts as contained in the brief of the United States, Petitioners feel compelled to briefly reply thereto for the purpose of clarification. It is understood by counsel for the Petitioners that the attorneys for the Department of Justice who prepared the statement of facts did not actually partake in the trial of this matter in the trial court and, therefore, certain occurrences as set forth in the Government's statement of facts may have been misinterpreted. It is the hope of the Petitioners that by this reply to said statement of facts, the same may be clarified.

The Government's statement of facts points out that shortly after the arrest of the Petitioners, F.B.I. agents searched along Belvoir Blvd., in the area of the arrest, and found two stockings, one of which had been knotted, and

a pair of black gloves. (Government's Brief, page 3.) Further testimony at the trial disclosed, however, that the same stockings were presented to the F.B.I. Laboratory for analysis; that human *head hairs* were discovered in said stockings; that said hairs were compared to human head hairs of the Petitioners, as supplied by the Cleveland Federal Bureau of Investigation to the Washington Bureau, and that by reason of the resulting comparison the F.B.I. expert was of the opinion that none of the hairs supplied as having come from the Petitioners matched the human head hairs taken from the stockings found on Belvoir Blvd.

"Mr. Barragate: All right. In any event, did you make a scientific examination and comparison of the human head hairs that you found in Government's Exhibit 47 with the hairs marked as defendant Calabrese's sampling of hair?

Agent Jennett: Yes, sir, I did.

Mr. Barragate: And what was the net result of that examination?

Agent Jennett: That the five human head hairs found in Government's Exhibit—

Mr. Barragate: 47?

Agent Jennett: 47—did not originate from the hairs furnished to me as having come from a Mr. Calabrese.

Mr. Barragate: When you say that they did not originate, you mean that they didn't come from this head of hair (indicating)?

Agent Jennett: That is correct." (Tr. 435.)

* * * * *

"Mr. Barragate: And again with respect to those comparisons, you found, did you not, that they did not come from the purported source that they were marked, with respect to the hairs that you found in Government's Exhibit 47? In other words, they were

not Calabrese's head hairs as compared to the ones you had?

The Court: Obviously, from what he has already testified the affirmative must be the answer to that question that the samples that he had were not the same as the hair which were marked as Calabrese's hair.

Mr. Barragate: Precisely, your Honor, precisely.

The Court: Is that correct?

Agent Jennett: Yes.

Mr. Barragate: And that is likewise true with respect to the defendant Delzoppo?

Agent Jennett: I didn't have a known sample as having come from—

Mr. Barragate: But you had a sample which was marked as having come from Delzoppo's head?

Agent Jennett: Yes." (Tr. 441-442.)

Note: [The Exhibit referred to—Exhibit 47—was a nylon stocking found on Belvoir Blvd.]

Further, in the statement of facts contained in the Government's brief, mention is made that a search of the Delzoppo automobile uncovered "several items of clothing, including a pair of gloves, and four pairs of sunglasses." (Government's Brief, pages 3 and 4.)

It must be pointed out that in all fairness none of these items were ever introduced by the Government in evidence; none of these items were ever presented to the bank witnesses for identification; and at no time did the Government contend that these items were used in the perpetration of the bank robbery or had any connection therewith. It is the hope of Petitioners' counsel, therefore, that this Court will be clarified as to the facts regarding the items of clothing found in Delzoppo's automobile and will not be misled to believe that the Government *at any time* contended that these items were used in the perpetration of the bank robbery.

It is the further hope of Petitioners' counsel that this clarification of the statement of facts as set forth in the Government's brief will aid the Court in a fair determination of the merits of the Petitioners' claim. Petitioners will now attempt to briefly reply to the points raised in the brief of the Government.

REPLY TO GOVERNMENT'S ARGUMENT NO. 1.

The Government contends that the trial court's questioning "of a few of the witnesses was intended to clarify confusing matters." (Government's Brief, page 5.) It is not contended by the Petitioners that a trial court does not have power to question witnesses in order to clarify. It is contended, however, that when questioning is undertaken by the trial court, the same must be conducted with discretion so as not to convey an opinion or a "hidden meaning" to the jury as to either the questioning or guilt or innocence of the defendants. Only by a reading of the testimony containing the questioning of the court, can a reviewing court determine whether the court acted within its discretion to question, or whether the court conveyed a hidden meaning or opinion as to the guilt or innocence of the Petitioners to the jury. In that regard, this Court is respectfully directed to the testimony of defense witness, Rollie J. Oker, and particularly the redirect examination thereof and the questions by the Court. (Tr. 557-559.) It was following this examination by the Court that culminated in the objection of defense counsel to the examination of various witnesses by the Court and the dissertation that followed thereon. (Tr. 561-565.) It was also at this point in the trial that defense counsel in objecting to the questioning of the Court indicated to the Court that its objection was not only as to questions asked but as to the manner and inflection given by the Court in asking the particular question.

"Mr. Barragate: The basis of the objection, your Honor, is that the jury may get some impression, from the manner in which the questions are asked by the Court, that the Court is becoming partial to either one side or the other side; and that, therefore, the questioning of any witness by the Court becomes prejudicial to the defendants in this case, because if the jury were to infer from the questions asked by the Court that the Court was being partial to the Government in its case, then obviously their judgment would be influenced by that determination. This is the only basis and reason of the objection.

Mr. Oaker: May I—

The Court: I think you ought to describe the manner in which the Court did—

Mr. Barragate: You can't describe it and the Record can't show it, because the Record reflects only the bare words, and that is the unfortunate part of the situation." (Tr. 562-563.)

The Government further contends in its brief that in one instance the examination of the Court resulted in an order favorable to the Petitioners, to the effect that the opinion of a Government expert witness was to be disregarded. (Government's Brief, page 5.) The particular opinion in question dealt with the inability of the expert witness of the Government to state an opinion based upon reasonable scientific certainty that a button found in what was admittedly the escape vehicle came from the shirt which had been introduced in evidence by the Government and had been claimed to have been thrown from the vehicle occupied by the Petitioners. A review of the testimony cited by the Government in its brief (specifically Tr. 466-484) clearly demonstrates that the Court ordered the opinion of the expert stricken only after it was faced with no other alternative. The Court conducted an examination of the witness which in the opinion of this counsel was

intended to elicit from the expert witness an opinion that based on reasonable scientific certainty the button in question came from the shirt in question. Whether or not the reviewing Court would be of the same opinion can only be determined by this Court reviewing the cited portions of the Transcript of Agent Nelson J. Jennett. It is unfortunate, however, that the Transcript cannot indicate the inflection given by the Court to certain words, which, of course, can totally change their meaning. One particular example which is clear in the mind of this counsel is the inflection given by the Court to the word "substantial" in regard to its use and a question propounded to the expert:

> "The Court: Now there is obviously a difference between 35/64 and 34.4/64, is that correct?
> The Witness: Yes, sir, that's correct.
> The Court: And that difference is .6/64 correct?
> The Witness: Yes, sir.
> The Court: Now would you call that a substantial difference?" (Tr. 474-475.)

The Government further contends in their brief that the Court's instruction to the jury during the course of the trial dealt largely with the meaning of the testimony and was not erroneous in substance. The Government further states that "although such comments might have reduced the strategic value of that testimony, they were not erroneous in substance." (Government's Brief, page 5.) Again, in reply, Petitioners' counsel submits to the Court that only a reading of the particular testimony in question will suffice for this Court to determine whether or not the purpose of the Court was to clarify for the jury or whether or not the effect thereof was to indicate to the jury an opinion or partiality.

Lastly, in regard to the first argument contained in the Government's brief, the Government contends that

at no time did the Court express an opinion as to the guilt or innocence of the Petitioners but to the contrary admonished the jury that there were no "hidden meanings in any of the Court's language." (Government's Brief, page 5.) It is respectfully submitted that a question arises as to why the Court felt compelled to instruct the jury that there were no hidden meanings in the Court's language unless the probability of the same had arisen from the conduct of the Court throughout the course of the trial.

REPLY TO GOVERNMENT'S ARGUMENT NO. 2.

Contained in the Government's answer brief (page 6) is the following statement:

> "Prior to Petitioners first trial the Court ordered the Government over its objection to produce these memoranda which had never been read, acknowledged or signed by the employees. The Court felt that the memoranda did not qualify as statements producible under the Jencks Act, 18 U.S.C. 3500, but felt that the defense was entitled to use the statements to assist in preparing for trial."

It is respectfully submitted that this is a clearly erroneous statement. This counsel is convinced, however, that the statement is not made with the intent to deceive this Court, but merely made because of the fact that the Assistant Attorney General was not aware of the facts as they took place during the course of the first trial. The fact of the matter was that the trial court, Judge Thomas Lambros presiding, during the course of the first trial clearly ruled that the statements in question came under the purview of the Jencks Act notwithstanding the fact that the Government submitted a memoranda to the contrary. Thereafter, the Court not only allowed the defense to use such statements to assist in preparing for trial, but

most important (and pursuant to the provisions of the Jencks Act) allowed the defense to make full use of the statements in cross-examination. That the statements were ruled as Jencks Act statements during the course of the first trial has already been clearly established and accepted and, although the Government may have contended at one point that these statements were not Jencks Act statements, the Government at no time contended that they were not ruled as being such by the first trial court.

One point that particularly astonishes Petitioners' counsel, is the continued reference in the Government's brief presently under consideration and in prior briefs of the Government regarding the matter as to defense counsel's "reading" from the statements in cross-examination. What this "reading" consisted of was defense counsel's propounding a question to the witness in the following fashion:

> "Mr. Barragate: [directed to the witness Betty Jamison]. Now, coming back with respect to the man who jumped over the counter, you recall, in talking with special agent Startzell, telling him that that man was about 5' 10" to 5' 11" tall." (Tr. 135.)

This was exactly the manner in which counsel would propound questions upon cross-examination to the various eye witnesses. In doing so, counsel for Petitioners would go through the statement of the officer of the Federal Bureau of Investigation, who prepared said statement from his recollection of his conversation with the particular witness, and counsel would ask the particular witness whether or not a certain statement was made by the witness to an F.B.I. agent. What other fashion the cross-examination of the eye witnesses based upon their prior inconsistent statements could take is unknown to this counsel. The fact that counsel held the particular statement in his hand

and questioned from it while the witness was on the witness stand was counsel's only method of referring to what the agent recalled as being the prior statement of the witness. Counsel could certainly not be called upon to commit the entire statement into memory and then question from what his memory was of the statement. Certainly there was no unfairness from holding the statement in counsel's hand during cross-examination and from questioning as to whether the witness made a prior inconsistent statement as was indicated thereon. The continued harassment of counsel during the entire course of the cross-examination of the eye witnesses, as based upon these statements, the breaking up of said cross-examination by the Court's complete misunderstanding of said statements and the Jencks Act and the inability of Petitioners' counsel to effectively cross-examine and impeach thereon is the very basis of the request for review by this Court.

It is stated in the Government's brief:

> "At the second trial the Judge initially ruled that counsel could not 'cross-examine a witness with that statement as though this was a statement she gave under the Jencks Act.'" (Tr. 210, Government's Brief, page 6.)

Thereafter, in their brief regarding this assertion the Government contends, however, that the defense was not limited or hampered in their cross-examination. Petitioners' counsel respectfully submits to this Court that the trial court's action throughout the cross-examination of the eye witnesses was consistent with the trial court's opinion that Petitioners' counsel could not "cross-examine a witness with that statement as though this was a statement she gave under the Jencks Act." Petitioners' counsel further respectfully submits that the trial court, having

that opinion, harassed, limited and hampered a cross-examination of these vital witnesses as to prior inconsistent statements; that, the Court's later realization and admission of the Court's error and the Court's granting to defense counsel the right to recall the various witnesses for further cross-examination is clear proof that the trial court itself felt that the cross-examination had been hampered by the erroneous ruling and belief of the Court. The only real question remaining, it would seem, is whether Petitioners' counsel can be faulted for not availing himself of the opportunity given by the Court to recall the witnesses. It is respectfully submitted that the reason for the decision for Petitioners' counsel not to recall the witnesses has already been adequately demonstrated. Suffice it to say that the Petitioners will rely upon this Court's experience regarding the recalling of witnesses long after their direct and cross-examination had been completed. It is respectfully submitted to the Court that had the need for recalling witnesses been caused through an error or omission on the part of the Petitioners, then it would appear that they should run the risk of the effect of recalling the witnesses; however, the Petitioners having been blameless in this regard and the fault resting upon the Court and the Assistant District Attorney, essential fairness would seem to require that Petitioners not be burdened with risk of recalling witnesses for testimony that should properly have been admitted without limitation or harassment, in the first instance.

Lastly, in the Government's answer brief, it is contended that while the Court determined that Petitioners had suffered no prejudice from the prior restriction on the use of the memoranda and cross-examination the Court nevertheless agreed to allow defense counsel to recall any of the bank employees for further cross-examination. It

is Petitioners' contention that the Court very well felt that the prejudicial error may have resulted from its prior actions but took the position that it would nonetheless go forward since a reviewing court would always have the opportunity to make that determination with regard to prejudicial error.

> "The Court: Well, I have made a few statements on the Record. With the exception of the Jencks Act statements—'Jencks Act statements'—I think everything else I said was fully justified, whether in or out of the presence of the jury.
>
> I am concerned about the effect of whatever the Court might have said in the presence of the jury with regard to the statements, however." (Tr. 335.)
>
> * * * * * *
>
> "The Court: I will instruct them, and if you wish to go forward with additional cross-examination with regard to them, fine and if you don't, we will go forward with the trial. The worst that can happen is that we face another trial later." (Tr. 326-327.)

In regard to this point, Petitioners' counsel further respectfully directs this Court's attention to the opinion of the Court of Appeals in affirming the Petitioners' conviction, in particular page 6 thereof, wherein the Court of Appeals states:

> "The Record further discloses that, even before the District Court ruled that the statements were within the scope of the Jencks Act, cross-examination and impeachment were not prevented. The District Court merely disapproved of the method that was being employed by defense counsel."

One may well question why the District Court later allowed the defendants the right to recall the bank eye witnesses for further cross-examination if, in fact, their cross-examination and impeachment was not prevented in

the first instance and if, in fact, the District Court merely *rightfully* disapproved of the method being employed by defense counsel in the original cross-examination and impeachment.

Again, Petitioners' counsel respectfully directs this Court to the opinion of the Court of Appeals (page 8) wherein it is likewise stated as follows:

> "Although the District Court initially limited to some extent the use of the statements on cross-examination, we hold on a review of the entire record that the limitation was not so severe as to constitute an abuse of discretion."

The Court of Appeals' opinion thereafter goes on to state that the manner of asking questions is "within the trial court's sound discretion," yet, one can again question if that discretion was properly exercised then why did the District Court allow recall for further examination. It must lastly be pointed out that although the Court of Appeals was of the opinion that cross-examination was limited rather than prevented, it is respectfully submitted by Petitioners that in a criminal matter of such grave consequences a limitation in any form of cross-examination and impeachment of *vital eye witnesses* should, in itself, be cause for reversal and fine hairs cannot be split as to the severity of the limitation.

Petitioners' counsel is of the hope that this Court will review with particular attention the portions of the transcript regarding the controversy as to the Jencks Act statement and the colloquy between the Court and counsel. (Tr. 307-355.)

In conclusion, the Petitioners respectfully submit to this Court that much of the thrust of our legal system in the last decade has been to insure essential fairness to a defendant in a criminal matter while preserving the rights

of the Government; that, it is difficult to be proud of a trial or to uphold a claim of essential fairness wherein a defendant *through no fault of his own* becomes the victim of an error which seriously affects his ability to defend himself and then has placed upon him the burden of attempting to remove that error; and that, in the matter now before the Court, the Petitioners ask not that they be found innocent of the crime charges but that they be given an opportunity to present their defense fully and completely and that they be unhampered and unrestrained in their rightful attempts to impeach witnesses who give testimony against them. It is only then that the Petitioners, regardless of the eventual outcome, will truly feel that essential fairness has been had and only then that justice will truly be served.

Respectfully submitted,

JAMES R. WILLIS,
Counsel for Petitioners.

Of Counsel:

PHILLIP A. BARRAGATE,
BARRAGATE AND BARRAGATE,
1333 Illuminating Building,
Cleveland, Ohio 44113.